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8
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 HANSEN BEVERAGE COMPANY, a
12 Delaware corporation,

13 Plaintiff,

14 v.

15 INNOVATION VENTURES, LLC dba
16 LIVING ESSENTIALS, a Michigan
corporation,

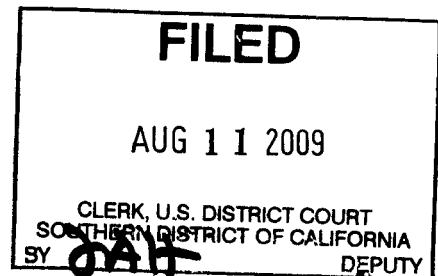
17 Defendant.

CASE NO. 08-CV-1166 IEG (POR)

~~(PENDING)~~ FIRST AMENDED
COMPLAINT FOR FALSE ADVERTISING
IN VIOLATION OF THE LANHAM ACT,
CALIFORNIA BUSINESS & PROFESSIONS
CODE §§ 17200 AND 17500 AND TRADE
LIBEL

AND

JURY TRIAL DEMAND



PREAMBLE

This case involves a seller of energy drinks who, instead of allowing its products to speak for themselves in the marketplace, resorted to false advertising and trade libel in order to try to boost its own position and diminish Hansen's. The Lanham Act and California law provide Hansen with remedies for the false advertising and trade libel that has harmed its commercial interests.

PARTIES

Plaintiffs.

1. Hansen Beverage Company is a Delaware corporation, licensed to do business in California, with its principal place of business in Corona, California.

2. Since 1992, Hansen has developed, marketed, sold, and distributed non-alcoholic beverages such as sodas, fruit juices, energy and sports drinks, smoothies, lemonades, and iced teas.

Defendant.

3. Innovation Ventures, LLC dba Living Essentials is, Hansen is informed and believes, a Michigan corporation with its principal place of business in Novi, Michigan. Living Essentials conducts business in this district.

4. Living Essentials commercially advertises and markets in interstate commerce competing energy drinks, each of which it publicly claims and represents, *inter alia*, produces five hours of energy.

JURISDICTION

5. Because this civil action arises under the Lanham Act, 15 U.S.C. §§ 1051, et seq., and specifically 15 U.S.C. § 1125(a)(1)(B), this Court has jurisdiction pursuant to 15 U.S.C. § 1121, 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a).

6. This Court also has subject matter jurisdiction pursuant to the provisions of 28 U.S.C. § 1332(a)(1) in that it is a civil action between citizens of different states, namely, California and Delaware and Michigan, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

6 8. Venue in this district is proper pursuant to the provisions of 28 U.S.C. §
7 1391(b).

9 Hansen.

9. Hansen's energy drinks have been extremely successful and are sold throughout the United States by more than 100,000 retail stores, including convenience stores, gas stations, supermarkets, club stores, drug stores and warehouse stores.

13 10. In 1997 Hansen introduced Hansen's® Energy Drinks.

11. Then, in April 2002, Hansen released the first of its popular Monster Energy® drinks. The line of Monster Energy® drinks has since grown to include the Lo-Carb Monster, Monster Khaos, Monster Assault, Monster M-80, Monster Heavy Metal, and Monster Mixxd energy drinks, which also use the Monster and Monster Energy® trademarks and similar trade dresses.

12. In 2004, Hansen introduced Lost® Energy™ Drinks and Rumba™. In 2005, Hansen introduced Joker Mad Energy™ drinks, a low-carb version of Lost® under the Perfect 10™ brand name as well as a new Lost® Five-O™ energy drink.

2 13. In 2006 Hansen introduced Ace™ Energy drinks and Unbound Energy® drinks.

14. Hansen's energy drinks have achieved significant success in commerce throughout the United States and are favored energy drinks for millions of customers.

15. Living Essentials' 5-HOUR ENERGY® drinks are competing energy-drink products that Living Essentials markets and sells in interstate commerce throughout the United States.

1 16. Living Essentials advertises its 5-HOUR ENERGY® drinks in commercial
2 advertising across the United States.

3 17. Rather than engage in fair competition in the marketplace, however, and allow
4 consumers to exercise their own choice, Living Essentials has resorted to false advertising
5 and trade libel to attempt to promote its 5-HOUR ENERGY® drinks and falsely to discourage
6 customers from using or purchasing Hansen's energy drinks.

7 **The False Advertising Claims.**

8 18. Indeed, the name, "5-HOUR ENERGY®," is, in and of itself, false and
9 misleading precisely because it states, or at a minimum implies, that two ounces of a 5-
10 HOUR ENERGY® drink produces a sustained level of "energy" for five hours. This is
11 untruthful based on the drink's ingredients and generally accepted principles of
12 biochemistry, pharmacology and physiology.

13 19. One 5-HOUR ENERGY® commercial states:

14 Why do energy drinks make you crash? One minute you're wired up. The
15 next you feel worse than before. The answer is large amounts of sugar and
16 caffeine. But with 5-Hour Energy you could sail through your day with no
17 jitters or crash. It contains B Vitamins for energy and amino acids for focus,
18 zero sugar and only 8 calories. Drink it in seconds and in minutes you're
19 feeling alert and productive and that feeling lasts for hours. 5-Hour Energy.
20 Hours of energy now. No crash later. Available at these fine stores.

21 20. Living Essentials' claim that "with 5-HOUR ENERGY® you could sail through
22 your day with no jitters or crash" is, based on the drink's ingredients and generally accepted
23 principles of biochemistry, pharmacology and physiology, a false and misleading statement
24 of material fact about 5-HOUR ENERGY®.

25 21. Living Essentials' claim that 5-HOUR ENERGY® "contains B Vitamins for
26 energy and amino acids for focus" is, based on the drink's ingredients and generally
27 accepted principles of biochemistry, pharmacology and physiology, false and misleading.

28 22. Living Essentials' claim that with 5-HOUR ENERGY® one can "drink it in
seconds and in minutes you're feeling alert and productive and that feeling lasts for hours"
is, based on the drink's ingredients and generally accepted principles of biochemistry,
pharmacology and physiology, false and misleading.

1 23. Living Essentials' claims in this as well as additional advertisements that
2 5HOUR ENERGY™ provides "Hours of energy now. No crash later" are, based on the
3 drink's ingredients and generally accepted principles of biochemistry, pharmacology and
4 physiology, false and misleading.

5 24. Another 5-HOUR ENERGY® commercial states:

6 Why are energy drinks bad? 12 spoons of sugar, that's bad. 200 calories, bad.
7 Guarana, tisk, tisk. Good for a short jittery burst, then a debilitating crash.
8 So don't drink energy drinks, drink 5-Hour Energy. It's not a drink, more like a
9 sip. Well with that sip you'll feel alert and focused for hours, without the
 crash or jitters. It has zero sugar, only 4 calories and no guarana. 5-Hour
 Energy. Hours of energy now. No crash later.

10 25. Living Essentials' claim in this as well as additional advertisements that "you'll
11 feel alert and focused for hours without the crash or jitters" is, based on the drink's
12 ingredients and generally accepted principles of biochemistry, pharmacology and
13 physiology, false and misleading.

14 26. Living Essentials' claim in this as well as additional advertisements that 5-
15 HOUR ENERGY® provides "Hours of energy now. No crash later" is, based on the drink's
16 ingredients and generally accepted principles of biochemistry, pharmacology and
17 physiology, false and misleading.

18 27. A recent 5-HOUR ENERGY® commercial directly attacks Hansen:

19 Kid: When you're ready to tear it up, grab an energy drink. Whoo. [Holding up a
20 can of Hansen Monster Energy® drink]

21 Announcer: When you've got a lot to do and you can't afford a let down, grab a 5-
 Hour Energy.

22 Kid: This is totally kickin.

23 Announcer: 5-Hour Energy keeps you going for hours without a crash unlike that
24 sugary kid stuff. [Looking at the can of Hansen Monster Energy® drink]

25 Kid: Whoa, harsh.

26 Announcer: Well, there's over 12 teaspoons of sugar per can – just look. [Referring
 to the can of Hansen Monster® Energy drink]

27 Kid: Gross.

28 Announcer: 5-Hour Energy does it all without the sugar. You'll go from groggy to

1 get it done.

2 Kid: You mean like, work?

3 Announcer: Yeah, you should try it some time.

4 Announcer: 5-Hour Energy – hours of energy now, no crash later.

5 28. This commercial is false and misleading because Monster Energy® does not
6 contain the equivalent of over 12 teaspoons of sugar. Furthermore, Living Essentials only
7 informs the listener in small fine print that the Monster Energy® beverage being discussed
8 comprises of two servings, making the commercial misleading. The commercial also falsely
9 implies that drinking Monster Energy® causes users to experience a crash.

10 29. Another recent commercial attacking Hansen provides:

11 Announcer: Excuse me, would you eat 12 teaspoons of sugar?

12 Store Patron: What? [Holding a can of Monster Energy®]

13 Announcer: That's what's in your energy drink.

14 Store Patron: Oh, nasty.

15 Announcer: Not only sugar but 200 calories per can.

16 Store Patron: Look, all I want is energy.

17 Announcer: Then try 5-Hour Energy. It has zero sugar and only 4 calories.

18 Store Patron: It's kinda small, isn't it?

19 Announcer: So, it takes seconds to drink and boom – you get the energy boost you
20 want without the crash or jitters.

21 Store Patron: No crash, huh?

22 Announcer: Still want that energy drink?

23 Store Patron: No thanks. I'll take the 5-Hour Energy.

24 Announcer: 5-Hour Energy. Hours of energy now.

25 Store Patron: No crash later.

26 30. This commercial is false and misleading because Monster Energy® does not
27 contain the equivalent of over 12 teaspoons of sugar or 200 calories. Furthermore, Living
28 Essentials only informs the listener in small fine print that the Monster Energy® beverage

1 being discussed comprises of two servings, making the commercial misleading. The
2 commercial also falsely implies that drinking Monster Energy® causes users to experience a
3 crash.

4 31. And another advertisement claims:

5 This is you after an energy drink. Unfortunately, so is this. Why do energy
6 drinks make you crash? One minute you're wired up. The next you feel
7 worse than before. The answer is large amounts of sugar and caffeine. That's
8 why you should try a new liquid energy shot called 5 Hour Energy. With 5
9 Hour Energy, you can leave grogginess behind and sail through your day
10 without feeling jittery, tense or, you know. That's because 5 Hour Energy
11 contains a powerful blend of B Vitamins for energy and amino acids for focus,
12 alertness and better mood. There is zero sugar, about as much caffeine as a
cup of coffee and only 4 calories. The 2-ounce shot takes just seconds to
drink and in minutes you're feeling bright, awake and productive and that
feeling lasts for hours. So if your energy drink makes you crash, switch to 5
Hour Energy. Hours of energy now, no crash later. Find out if 5 Hour Energy
is right for you. It's available at these fine stores, or for more information go to
5hourenergy.com.

13 32. Living Essentials' claims in this as well as additional advertisements that 5-
14 HOUR ENERGY® provides "Hours of energy now. No crash later" are, based on the drink's
15 ingredients and generally accepted principles of biochemistry, pharmacology and
16 physiology, false and misleading

17 33. Living Essentials' claim in this as well as additional advertisements that "with
18 5-HOUR ENERGY® you can leave grogginess behind and still do your day without feeling
19 jittery and tense or, you know" is, based on the drink's ingredients and generally accepted
20 principles of biochemistry, pharmacology and physiology, false and misleading.

21 34. Living Essentials' claim in this as well as additional advertisements that "5-
22 HOUR ENERGY® contains a powerful blend of B Vitamins for energy and amino acids for
23 focus, alertness and better mood," is, based on the drink's ingredients and generally
24 accepted principles of biochemistry, pharmacology and physiology, false and misleading.

25 35. In addition, 5-HOUR ENERGY® conspicuously makes the following claims on
26 each drink's container:

- 27 • "Hours of energy now"
28 • "No crash later"
 • "Feel it in minutes • Lasts for hours"

- 1 • "Sugar free"
- 2 • "0 net carbs"

3 36. 5-HOUR ENERGY® Decaf conspicuously makes the following claims on each
4 drink's container:

- 5 • "Hours of energy now"
- 6 • "No crash later"
- 7 • "Feel it in minutes • Lasts for hours"
- 8 • "Sugar free"
- 9 • "Decaf"
- 10 • "Only 4 calories"

11 37. 5-HOUR ENERGY® EXTRA STRENGTH conspicuously claims on each drink's
12 container:

- 13 • "Sugar free"
- 14 • "Only 4 calories"

15 38. Living Essentials' claims in the quoted advertisements and/or on the product
16 containers that 5-HOUR ENERGY® products provide "hours of energy now," or "sail through
17 your day with no jitters or crash," or "in minutes you're feeling alert and productive and that
18 feeling lasts for hours 5-Hour Energy," or "Hours of energy now. No crash later," or "Feel it
19 in minutes lasts for hours" are, based on 5-HOUR ENERGY®'s ingredients, at least as
20 disclosed on the applicable product container labels, false and misleading based on
21 generally accepted principles of biochemistry, pharmacology and physiology and cannot
22 and do not produce the effects claimed.

23 39. Living Essentials' claims in advertisements that its 5-HOUR ENERGY® products
24 make the drinker "feel alert and focused for hours, without the crash or jitters" are, based on
25 the products' ingredients, at least as disclosed on the applicable product container labels,
26 false and misleading, given generally accepted principles of biochemistry, pharmacology
27 and physiology, and do not and cannot produce the effects claimed.

28 40. 5-HOUR ENERGY® Decaf's ingredients, at least as disclosed—"sugar free,"
"Decaf," "6 mg. of caffeine," "only 4 calories"—given generally accepted principles of
biochemistry, pharmacology and physiology, do not and cannot provide "Hours of energy
now," "Feel it in minutes • Lasts for hours," "No crash later," as Living Essentials claims.

1 Those claims are further false and misleading based on the products' ingredients including,
2 in particular, the limited amount of caffeine and sugar in the products, at least as disclosed
3 on the applicable container labels.

4 41. 5-HOUR ENERGY® Extra Strength's claims, described in paragraphs 18-30 and
5 33 above, including its claim derived from the name of the product itself, are false and
6 misleading based on the product's claims to be "sugar free" and "only 4 calories" and the
7 product's other ingredients at least as disclosed on the applicable container labels, given
8 generally accepted principles of biochemistry, pharmacology and physiology.

9 The Trade Libel.

10 42. Living Essentials' statements that energy drinks contain "12 spoons of sugar,
11 that's bad. 200 calories, bad. Guarana, tisk, tisk." falsely disparages energy drinks in
12 general that contain some or all the ingredients to which Living Essentials refers, because
13 such statements falsely impute adverse characteristics to and consequences of such
14 ingredients. Such statements constitute a trade libel of and/or against energy drinks in
15 general, including Hansen's energy drinks which fall within the class of drinks known as
16 energy drinks.

17 43. Living Essentials' commercial—both the audio message and the depiction of
18 an individual placing 12 heaping spoons of sugar into a 16 oz. Monster Energy® drink can—
19 falsely disparage Hansen's products by falsely imputing adverse characteristics to and
20 consequences of such ingredients. Such statements constitute a trade libel of and/or against
21 energy drinks in general, including Hansen's energy drinks which fall within the class of
22 drinks known as energy drinks.

23 44. Living Essentials' statements that energy drinks are "good for short jittery
24 bursts, then a debilitating crash" are false and misleading statements, and by clear
25 reference and/or inference falsely, disparage energy drinks in general, including Hansen's
26 energy drinks which fall within the class of drinks known as energy drinks.

27 45. Living Essentials' statement "why do energy drinks make you crash" is false
28 and misleading and constitutes trade libel in that by clear reference and/or by inference it

1 falsely disparages energy drinks in general, including Hansen's energy drinks which fall
2 within the class of drinks known as energy drinks.

3 46. Living Essentials' statements, "One minute you're wired up. The next you feel
4 worse than before" are false and misleading and constitute trade libel in that, by clear
5 reference and/or by inference they falsely disparage energy drinks in general, including
6 Hansen's energy drinks which fall within a class of drinks known as energy drinks. Such
7 statements suggest that energy drinks in general, including Hansen's energy drinks, contain
8 large amounts of sugar and caffeine which produce results that 5-HOUR ENERGY® drinks do
9 not despite the fact that 5-HOUR ENERGY® drinks contain even higher levels of caffeine
10 than Hansen's energy drinks. Such claims about Hansen's energy drinks are in any event
11 false and misleading.

12 47. Living Essentials' statement, "the answer is large amounts of sugar and
13 caffeine" is false and misleading and constitutes trade libel in that it falsely disparages energy
14 drinks in general, including Hansen's energy drinks which fall within the class of drinks
15 known as energy drinks.

16 48. Living Essentials' statement that "with 5-HOUR ENERGY® you can leave
17 grogginess behind and still do your day without feeling jittery and tense or, you know" is
18 false and misleading and constitutes trade libel in that it falsely disparages energy drinks in
19 general, including Hansen's energy drinks which fall under the claim of drinks known as
20 energy drinks.

21 49. The statements quoted above are false and misleading statements of material
22 fact about Living Essentials' own products and also, by clear inference, about Hansen's
23 energy drinks, such that they are likely to influence the purchasing decisions of a substantial
24 number of reasonable consumers and actually deceive or have the tendency to deceive a
25 substantial segment of the reasonable consumer audience.

26 50. All such statements constitute false advertising that Section 43(a) of the
27 Lanham Act, 15 U.S.C. § 1125(a), and also California's unfair competition law, Business &
28 Professions Code §§ 17200 and 17500, prohibit.

[FALSE ADVERTISING—VIOLATION OF 15 U.S.C. § 1125(a)]

59. As a direct and proximate result, Hansen has suffered injury and harm and will

1 continue to suffer such harm, including money damages in excess of \$75,000, exclusive of
2 interest and costs, the exact amount of which Hansen will prove at trial.

3 60. Hansen is informed and believes that Living Essentials' false and misleading
4 advertising is willful.

5 61. Hansen has no adequate remedy at law with respect to Living Essentials' future
6 false and misleading commercial advertising precisely because Hansen is informed and
7 believes that Living Essentials will continue in its same course of conduct unless and until it
8 has been restrained by an order of this Court.

9 **SECOND CLAIM FOR RELIEF**

10 **[FALSE ADVERTISING—CALIFORNIA LAW]**

11 62. Hansen incorporates by this reference paragraphs 1 through 59, above.

12 63. Living Essentials' conduct, as alleged above, violates the misbranding
13 provisions of the Federal Food, Drug and Cosmetic Act, 21 USC §§ 343 and 350, which
14 make the false or misleading labeling of, *inter alia*, dietary and vitamin supplements
15 unlawful and illegal.

16 64. In addition, Living Essentials' conduct, as alleged above, violates § 5 of the
17 Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), in that it constitutes an unfair method
18 of competition in or affecting commerce and unfair and deceptive acts and practices in or
19 affecting commerce.

20 65. Living Essentials' conduct, as alleged above, constitutes false advertising and
21 unfair competition pursuant to the provisions of Business & Professions Code §§ 17200 and
22 17500.

23 66. As a direct and proximate result, Hansen has suffered injury and harm and will
24 continue to suffer injury and harm both by the direct diversion of sales from Hansen to
25 Living Essentials and by a lessening of the goodwill associated with Hansen's products.

26 67. Hansen has no adequate remedy at law with respect to Living Essentials' future
27 false and misleading commercial advertising precisely because Hansen is informed and
28 believes that Living Essentials will continue in its same course of conduct unless and until it

1 has been restrained by an order of this Court.

2 **THIRD CLAIM FOR RELIEF**

3 **[TRADE LIBEL]**

4 68. Hansen incorporates by this reference paragraphs 1 through 65, above.

5 69. By virtue of all of Living Essentials' false and misleading statements as set forth
6 above, and by singling out Hansen's energy drinks by their well-known ingredients, Living
7 Essentials' has engaged in the intentional disparagement of the quality of energy drinks in
8 general and of Hansen's energy drinks in particular, resulting in the money damages that
9 Hansen has suffered.

10 70. As a direct and proximate result of all of Living Essentials' false and misleading
11 statements as set forth above and also as a direct and proximate result of Living Essentials'
12 trade libel and intentional disparagement of the quality of energy drinks in general and of
13 Hansen's energy drinks in particular, Hansen has suffered money damages in an amount not
14 presently known, but in excess of \$75,000, exclusive of interests and costs, and which will
15 be proved at trial.

16 71. Living Essentials' conduct constitutes an intentional misrepresentation and
17 false, defamatory statements, all with the intention of causing injury to Hansen and is
18 oppressive, fraudulent and malicious conduct as defined in California Civil Code § 3294.
19 Hansen should recover, in addition to its actual damages, exemplary and punitive damages
20 according to proof.

21 WHEREFORE, Hansen Beverage Company prays for relief against Living Essentials as
22 follows:

- 23 1. For preliminary and permanent injunctive relief against Living Essentials
24 pursuant to 15 U.S.C. §§1116 and 1125(a) and Business & Professions Code § 17203;
25 2. For an award of money damages;
26 3. For the recovery of Living Essentials' illegal and unjust profits;
27 4. For three times Hansen's actual money damages;
28 5. For a finding that Living Essentials' conduct constitutes an exceptional case,

1 such that Hansen is entitled to its attorneys fees in addition to its costs and expenses of suit;

2 6. For disgorgement of Living Essentials' illegal and unjust profits;

3 7. For punitive and exemplary damages; and,

4
5 8. For such other and further relief as this Court deems just and proper.

6
7 DATED: July 8, 2009

SOLOMON WARD SEIDENWURM & SMITH, LLP

8
9 By: /s/ Edward J. McIntyre

10 NORMAN L. SMITH

EDWARD J. MCINTYRE

11 ALISON L. PIVONKA

Attorneys for Hansen Beverage Company

12 **DEMAND FOR JURY**

13 Hansen Beverage Company demands a jury trial of all claims triable by a jury.

14
15 DATED: July 8, 2009

SOLOMON WARD SEIDENWURM & SMITH, LLP

16
17 By: /s/ Edward J. McIntyre

18 NORMAN L. SMITH

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